IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. —.

A. A. SPRAGUE, Receiver for the Chicago, North Shore and Milwaukee Railroad Company, *Petitioner*,

v.

J. ALBERT WOLL, United States Attorney for the Northern District of Illinois, et al., *Respondents*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Court of Appeals, Seventh Circuit, made on July 22, 1941, not yet reported, is printed in the record at page 574.

The memorandum opinion of the District Court of the United States for the Northern District of Illinois, Eastern Division, filed November 18, 1940, not reported, is printed in the record at Pages 544 to 549, inclusive. The order of that court, entered November 18, 1940, is shown at Pages 542 and 543 of the printed record.

JURISDICTION.

The jurisdiction of this court is invoked under the provisions of Section 204a of the Judicial Code, as amended by the act of February 13, 1925 (C. 229, Sec. 1-43, Stat.: 938, 28 U. S. C. A. Sec. 347 (a)).

The date of the judgment to be reviewed is July 22, 1941, (R. 580).

STATEMENT OF THE CASE.

The foregoing petition for a writ of certiorari contains a concise statement of the case and, in the interest of brevity and to avoid repetition, it is hereby adopted.

SPECIFICATION OF ERRORS.

1. The United States Circuit Court of Appeals, Seventh Circuit, erred in sustaining the order and judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division.

2. That court erred in holding that the Interstate Commerce Commission had the authority, on its own motion, to reopen and reconsider its determination of November 7, 1936, as no such authority is conferred upon that Commission by the provisions of the Railway Labor Act or by the provisions of the Interstate Commerce Act.

3. That court erred in failing to find that when, on November 7, 1936, upon the request of the National Mediation Board, the Commission determined that the petitioner fell within the exemption proviso of the Railway Labor Act the Commission exhausted its authority over the subject-matter under the provisions of that Act, and that it had no authority thereafter, on its own motion, to reopen that proceeding for further hearing and for a reconsideration of the question.

4. That court erred in holding that the determination made by the Interstate Commerce Commission, of July 11,

1939, as the result of the further hearing on the consolidated record, that petitioner does not fall within the terms of the exemption proviso of the Railway Labor Act, is valid, because supported by substantial evidence.

5. That court erred in stating that it is clear from the record that the evidence upon which the report of the Commission of November 7, 1936, was incomplete and inadequate, in the absence of any opposition to the contentions of petitioner, and in failing to find that the additional evidence introduced before the Commission on the further hearing showed no material or substantial change in the physical or functional characteristics of petitioner.

THE STATUTE.

This case involves the construction of the Railway Labor Act, as amended June 21, 1934 (45 U. S. C. A., Secs. 151-163); and of Sections 13(2), 16(6) and 16a and 17(4) of the Interstate Commerce Act.

QUESTIONS PRESENTED.

The questions presented for determination are:

1. The power, authority, and function of the Interstate Commerce Commission under the Railway Labor Act, as amended June 21, 1934;

2. Whether the Commission had the authority under the Railway Labor Act or under any provisions of the Interstate Commerce Act, to reopen for reconsideration, on its own motion, a decision theretofore made by that Commission under the Railway Labor Act upon the request of the National Mediation Board;

3. Whether the determination made by the Commission on July 11, 1939, as the result of the further hearing that petitioner is not an interurban electric railway and that it is operated as a part of the general railroad system of transportation is supported by substantial evidence, is ar-

bitrary and capricious and not in accordance with applicable rules of law;

4. Whether the court below erred in refusing to reverse the judgment of the court of original jurisdiction in this proceeding.

SUMMARY OF ARGUMENT.

1. Even though the authority to make a determination as to the status of the petitioner under the Railway Labor Act, was validly conferred upon the Commission by that act, the question as to whether the Commission acted within its authority is a proper subject of judicial review (*Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 127).

2. Unlike the Interstate Commerce Act, the Railway Labor Act confers no administrative or supervisory authority upon the Interstate Commerce Commission. Under the Railway Labor Act the Commission has no authority to make a determination as to the status of an electric railway until and unless it is requested to do so by the National Mediation Board or upon complaint of an interested party. As was stated by this court in *Shannahan* v. *United States*, 303 U. S. 596, a decision by the Commission under the Railway Labor Act is not an order and the only action which could ever be taken on such a determination would be by some other tribunal. Therefore, when the Commission, on November 7, 1936, determined at the request of the National Mediation Board, after hearing, that petitioner fell within the exemption provisions of the Railway Labor Act, the authority of the Commission under that act was exhausted and the Commission had no right, on its own motion thereafter, to reopen that case and to consolidate it for further hearing with other cases. There is no provision in the Railway Labor Act similar to Section 13(2) of the Interstate Commerce Act which confers authority on the Commission to institute an investigation on its own motion "as to any matter or thing concerning which a *complaint* is authorized

to be made * * *." Even under Section 16(6) of the Interstate Commerce Act which authorizes the Commission "to suspend or modify its orders upon such notice and in such manner as it shall deem proper," the authority is limited to orders still under its control (*Louisville & Nashville R. R. Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217). The order of the Commission of February 5, 1938, which purported to reopen its determination of November 7, 1936, and its determination of July 11, 1939 are null and void and of no effect. While the doctrine of *res adjudicata* may not control decisions of the Commission, this court has said that the Commission is bound to recognize the validity of the rule of conduct prescribed by that doctrine (*Arizona Grocery Co.* v. *A. T. & S. F. R. Co.*, 284 U. S. 370).

3. The determination by the Commission of July 11, 1939, that the North Shore does not fall within the exemption proviso of the Railway Labor Act, is not only contrary to its determination made on substantially the same facts, of November 7, 1936, but is arbitrary, capricious, contrary to the evidence, and contrary to applicable rules of law. The court may review and set aside a determination made by the Commission under these circumstances (*Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177).

4. In the *North Shore* case; in *Piedmont & Northern R.* v. *I. C. C.* 286 U. S. 299; and in *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 127, this court clearly indicated that prior to 1920, the phrase "interurban electric railway" was not commonly used to designate a carrier whose *major activity* was the transportation of interstate freight. Those decisions also recognize that an electric railway does not cease to be an interurban electric railway merely because, in addition to its passenger business, it handles interstate carload freight in standard freight cars. The major and dominant activity of petitioner is the transportation of passengers. For these reasons, the determination made by the

Commission of July 11, 1939, is arbitrary, capricious, contrary to the evidence and contrary to the statute.

5. In its determination of July 11, 1939, the Commission considered facts and circumstances which could not legally influence its conclusions. That determination should therefore be set aside. (*St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38.) The report of the Commission of July 11, 1939, shows that it was improperly influenced by the fact that the labor organizations which represented the employes of the North Shore took a different position with respect to the status of that carrier under the Railway Labor Act, in the consolidated proceeding, from the position taken by that organization in the proceeding out of which the determination of November 7, 1936, was made. The Commission was also influenced by the fact that, in the second proceeding, the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen intervened and supported the position of the employes of the labor organization of the North Shore. The Commission should not have permitted itself to be influenced to any extent by the identity or importance of the parties concerned, nor by the desire of one party over another, nor by any results which might be beneficial or otherwise. Only by a tortured construction of the statute and of the evidence, could the determination of July 11, 1939, be made by the Commission.

6. The determination by the Commission of July 11, 1939, that the North Shore is operated as a part of "the general steam railroad system of transportation," is contrary to the statute and is arbitrary and capricious. This determination by the Commission is based solely on the ground that the North Shore interchanges carload freight with steam railroads, and maintains through freight rates with such railroads. The proviso in Section 1, First, the Railway Labor Act excludes "street, interurban or suburban electric railways, unless such railway is operated as a part of a general steam railroad system of transportation, but

shall not exclude any part of the general steam railroad system of transportation now or hereafter operated by any other motive power. The Commission did not find that the North Shore is operated as a part of *a* general steam railroad system of transportation, but found that it is operated as a part of *the* general steam railroad system of transportation. The first clause obviously refers to an electric railway. The second clause does not refer to electric railways, as such, but refers to parts of a general steam railroad system such as the Pennsylvania Railroad, the New York Central, and other railroads engaged in general transportation. The Commission construed the second clause of the proviso to contemplate a national railroad system of transportation. There is no such thing in America as a national steam railroad system of transportation. Such system as exists is composed of separately operated and separately incorporated railroad systems. The word "system" was used by Congress to embrace an operating relationship and unity, involving common control, common management, and operation as a system. *Piedmont & Northern* v. *United States,* 30 F. (2d) 421; *St. Louis & O'Fallon* case, 124 I. C. C. 3, 10; *Michigan United Railway case,* 67 I. C. C. 452; *Sacramento Northern Ry. case,* 71 I. C. C. 653; *Hudson & Manhattan R. Co.* v. *Hardie,* 103 F. (2d) 327, certiorari denied 307 U. S. 640; *New York, Westchester & Boston Ry.,* 218 I. C. C. 253. As was aptly stated by the three-judge court in the *Piedmont & Northern* case, the word "general" as used in the statute, refers to the *kind* of transportation performed, that is, whether the service performed by the railroad was *special, local* or *general.*

ARGUMENT.

The Interstate Commerce Commission Exceeded Its Statutory Authority in Purporting to Reopen and Reconsider Its First Determination.

The nub of this question is fairly dealt with in Paragraph 2 of the Summary of Argument. It is sufficient to say, at this point, that none of the decisions relied on by the defendant, and by the court below, as authority for the proposition that an administrative tribunal, such as the Commission, may reopen cases on their own motion without affirmative statutory authority, to correct errors, etc., deal with a situation similar to the one here presented. We recognize that it is settled that a tribunal like the Commission may reopen and reconsider decisions on their own motion, to correct errors, made in cases where such tribunals have continuing administrative authority. All of the cases cited by defendants are of that character. For example, they rely on: *Ford Motor Company* v. *National Labor Relations Board*, 305 U. S. 364; *Fly* v. *Heitmeyer*, 309 U. S. 146; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 240; *Louisville & Nashville R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 317, and several decisions of the Interstate Commerce Commission.

In each of these cases, the administrative agency dealt with a subject as to which it had administrative and continuing authority. In the *Sloss-Sheffield* case, this court recognized that the Commission had the authority to suspend or modify its orders but said that such authority is limited to orders still under its control. Under the Railway Labor Act the Commission has no administrative authority and, in fact, has no authority to determine the status of an electric line under that act, unless the Mediation Board requests it to do so, or unless a complaint is filed by an interested party. After its decision of November 7, 1936, which determined the North Shore to be an interurban electric railway, excluded from the provisions of the Railway Labor

Act, no party requested the Commission to reopen or reconsider that decision. The Commission did so on its own motion and then consolidated the reopened proceeding with other proceedings which had arisen under the Railroad Retirement Act and the Carriers' Taxing Act. Under these circumstances, it is our contention that when the Commission made its determination on November 7, 1936, it exhausted its authority over that subject-matter and did not thereafter have any right to reconsider that determination on its own motion.

The Determination by the Interstate Commerce Commission of July 11, 1939, in the Consolidated Proceeding That the North Shore is Subject to the Railway Labor Act is Arbitrary, Capricious, Contrary to the Evidence, and Contrary to the Law.

Interurban electric railways, as distinguished from street car railways, are subject to all of the Federal laws, including the Interstate Commerce Act, which apply to common carriers by railroad except the provisions which exclude them. (*Omaha & Council Bluffs Street Ry. Co.* v. *I. C. C.*, 230 U. S. 324; *Spokane & Inland Empire R. R. Co.*, v. *U. S.* 241 U. S. 344; *U. S.* v. *Hubbard*, 266 U. S. 474.) Since 1916, and more particularly since the passage of the Transportation Act of 1920, Congress has seen fit to exclude street, suburban and interurban electric railways from certain provisions of the Transportation Act and of other regulatory statutes because they were not considered as within the mischief sought to be corrected or the purposes sought to be achieved by such provisions.

The meaning of the phrase "street interurban or suburban electric railway", as used in the Railway Labor Act, is not defined. In considering the meaning of that phrase in its report of July 11, 1939 (R. 28-42), the Commission practically held that the phrase is limited to electric lines which handle passenger traffic and do not interchange interstate carload freight with steam railroads. This is an

unwarranted and arbitrary interpretation of the statute. Moreover, it is contrary to the decisions of this court which deal with the subject. It is also contrary to the historic and legislative meaning of the phrase. As early as 1902 the United States' Census Reports showed that the term "interurban electric railway" was applied to electric lines which were then rapidly developing and which carried freight, express, mail, and passengers (R. 460-462). In fact the Census Reports for the years 1907, of 1912, and of later years, emphasize that interurban electric lines operated long freight trains over private rights-of-way, and at high speeds, and that these lines rivaled the main-lines of steam railroads (R. 461). That fact was also recognized by this court in the *Omaha and Council Bluffs* case, and in the *Spokane and Inland Empire* case, long before Congress used the term "interurban electric railway" in the Interstate Commerce Act, and that fact was also recognized by the Commission in numerous decisions between 1907 and 1915. *Chicago & Milwaukee Electric R. Co.* v. *I. C. Railroad Co.*, 13 I. C. C. 20; *Chicago, Ottawa & Peoria Ry. Co.* v. *C. & N. W. R. Co.*, 33 I. C. C. 573; *Cincinnati & Columbus Traction Co.* v. *B. & O. SW. R. R. et al.*, 20 I. C. C. 486; and *St. Louis, Springfield & Peoria R. R. Co.* v. *P. & P. U. Ry. Co.*, 26 I. C. C. 226.

As Congress did not see fit to define the term "interurban electric railway" it must be assumed that it used the term in the sense that it had been used by the courts, by the Commission, and other state and Federal agencies. The authorities referred to show that before Congress used the term in federal statutes it had been commonly used to include electric lines which operated between urban communities over private rights-of-way, as well as over city streets, and which carried freight, mail and express, in addition to passenger traffic.

It is arbitrary for the Commission to say that an interurban electric line ceases to be such if it engages in the transportation of freight, and participates in through rates and interchanges carload freight traffic with steam railroads.

In the *Omaha and Council Bluffs* case, decided in 1913, this court considered a decision of the Interstate Commerce Commission, which held that the Omaha and Council Bluffs Street Electric Railway was subject to the Act to Regulate Commerce because the term "railroad" in that act was unqualified as to motive power. The court held against the Commission and said that the term "railroad" as used in that act cannot be construed to include a street railway, and apropos of the contention made by the Commission with respect to the development of a new type of electric railway, the court said:

> "But it is said that since 1887, when the act was passed, a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mail for long distances at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight."

A careful reading of the second report of the Commission (R. 28-42), in the light of the unusual circumstances surrounding this case, warrants the inference that the Commission was improperly influenced by the attitude of the labor organizations and by certain inconsequential facts, which were added to the record in the second hearing, and which were seized upon and emphasized by the Commission to support a conclusion different from its first conclusion, but one that was in accord with its plainly disclosed policy of bringing about a result which, in the opinion of the Commission, would be benefical to the employees of petitioner under the Railroad Retirement Act.

Throughout this proceeding the defendants and the Commission have placed great emphasis on the fact that the original determination of the Commission was made in a nonadversary proceeding while the second determination was made in an adversary proceeding, the latter resulting, as the defendants say, in the introduction of more compre-

hensive facts, which they claim justified the different conclusion reached by the Commission.

The court below was misled by the emphasis placed upon this aspect of the case. In the opinion of Judge Sparks (R. 577), the statement is made that "it is clear from the record that the evidence, upon which the original report was based, was very incomplete and inadequate, in the absence of any opposition to the contention of the North Shore." With due deference to the court below, we submit that there is absolutely no justification for that statement. We repeat that when the entire record is examined it will be found that none of the additional evidence introduced at the second hearing is of a character which showed any material or consequential change in either the functional or physical characteristics of the petitioner. This evidence, if viewed judicially, does not warrant a different conclusion from the conclusion originally reached by the Commission on the original record. The fact that the first proceeding was nonadversary, is also without significance. Some of the most important and far-reaching decisions of the Interstate Commerce Commission are made in nonadversary proceedings. Moreover, the examiner who presided at both the original and the second hearing, had presided at practically every proceeding which has arisen before the Commission under the Railway Labor Act, and related acts. The examiner knew, from the intimate experience thus gained, that certain essential facts should be developed at each of them, irrespective of whether there were opposing parties, and that he had the right and the duty to see to it that all material facts were developed. It should also be kept in mind that in the prosecution of the case, which resulted in the decision of this court in *United States* v. *Chicago, North Shore & Milwaukee R. Co.*, 288 U. S. 1, the government had access to all of the records of the North Shore and that all essential facts, including interchange arrangements, with respect to the carrier, were developed in the trial of that case and were before this court when

its decision was made. The record here shows that there has been no material change in the essential facts with respect to the functional or physical characteristics of the North Shore since that time.

The material and outstanding physical and functional characteristics of the petitioner are shown to have been the same by the evidence before the Commission in both proceedings. But, to give effect to its conclusion the Commission, in its second report emphasized such inconsequential matters as the fact that in the original report the statement was made that petitioner had main-line grades of 7 per cent, whereas it was shown at the consolidated hearing that the maximum main line grade is 5.85 per cent for a distance of 1400 feet north of Harrison Street in Milwaukee, and that there are no curves on the Skokie Valley Line north of Buena Park which hinder the movement of freight cars. Petitioner did not, at any time, claim that standard freight cars could not be handled north of Buena Park on the Skokie valley line. The testimony of record (R. 357) shows that there are many curves in the main-line track as well as in the shop and yard tracks of 100 foot radius or less; and that this character of curvature in track is common to electric railways, which must operate around street corners, and that trains of steam railroads could not operate around such curves (R. 357, 378). The record also shows that there are some very sharp curves at Dempster Street on the Skokie valley line.

It was shown at the original hearing that petitioner interchanged carload freight with steam railroads at several points and handled a substantial number of cars of carload freight each year. This was also shown in the record on which the decision of this court was made in the North Shore securities case. The Commission and the government make much of the fact that in its original report the Commission stated that no carload freight is handled to or from or interchanged at, either of the "two principal terminals" of petitioner, whereas it was disclosed at the second hearing that carload freight is interchanged by peti-

tioner with one steam railroad at Buena Park within the corporate limits of Chicago.

As nearly 80 per cent of the business of the North Shore consists of the transportation of passengers, and as the two principal passenger terminals of the petitioner are located in the down-town sections of Chicago and of Milwaukee, the statement in the first report of the Commission on this subject is correct (R. 170). In other words, it is a fact, as stated by the Commission, in that report, that carload freight cannot be handled or interchanged by petitioner at either of its "two principal terminals."

As it was shown at the first hearing that petitioner interchanged carload freight with steam railroads at several points, it is of no material significance that through inadvertence it was not shown at the first hearing that one of the interchange points was Buena Park, located within the corporate limits of Chicago. In their desire to feature this aspect of the case the defendants have sought to create the impression that petitioner has general interchange facilities for the interchange of freight within the city of Chicago, whereas the facts as shown by the testimony of witness Fallon, chief executive officer of petitioner, are that the interchange facilities at Buena Park are limited and are maintained under special conditions (R. 376-379).

Carloads of freight received by petitioner at Buena Park are handled to a point outside the limits of Chicago by the Chicago Rapid Transit Company, as agent for petitioner, over specially constructed gauntlet tracks which utilize the right-of-way also used by the passenger trains of the Rapid transit company in its mass movement transportation. This freight is handled by the Rapid transit from Howard Street, which marks the city limits of Chicago to Prairie Road on the Skokie valley line, a distance of about 2½ miles (R. 377). The service is highly restricted, as is the traffic. The traffic is restricted to shipments received from the Chicago, Milwaukee, St. Paul and Pacific Railroad in Chicago. The ordinary interchange arrangements between steam railroads in Chicago permits each of the railroads to enjoy the

facilities of the full switching district of Chicago (R. 377).

The interchange tracks are at the foot of a 2 per cent grade. There are no team-track facilities at this point. There is no opportunity for the consignee to receive the freight on these tracks. The movement from Howard Street to Prairie Road is over a complicated network of interlocking plants. The lead-up from the northbound track or the track that runs to Evanston, to the track that reaches the Skokie Valley branch, are through five switches which have about 21 degree curvature, and thence they go down a 3 per cent grade and up that grade in the opposite direction (R. 377-378). This service is at the sufferance of the Milwaukee railroad. The contract under which petitioner uses the track of that railroad provides for the operation of carload freight over these tracks. The Milwaukee has the right to cancel the contract at any time (R. 378-379). No cars containing less-than-carload freight are interchanged at Buena Park, nor has petitioner reciprocal switching arrangements with any steam railroad, either in Chicago or Milwaukee, or at any point other than at Racine, Wis. On the other hand, reciprocal switching arrangements are generally maintained by steam railroads at all interchange points (R. 379).

In its second report the Commission repeated the statement made in its first report to the effect that the North Shore has seven electric locomotives weighing from 50,000 to 70,000 pounds each, and then stated that it was not pointed out, however, in its previous report that two or more of these locomotives can be coupled together so as to afford a proportionately greater hauling capacity, and that when so coupled trains of as many as 50 cars are hauled (R. 529). There is nothing novel in this practice. The occasional use of two locomotives is for reasons of economy and efficiency.

Florida East Coast R. Co. v. *United States*, 234 U. S. 167; 58 L. Ed. 1267, is a case involving a situation wherein the Interstate Commerce Commission in one proceeding

approved certain rates as lawful and in a later case reversed itself. The carrier contended that there was no evidence in the second proceeding to support the reversal. In that case Mr. Chief Justice White said:

> "While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding, and may not be re-examined in the courts, it is undoubted that where it is contended that an order whose enforcement is resisted was rendered without any evidence to support it, the consideration of such a question involves not an issue of fact, but one of law, which it is the duty of the courts to examine and decide. (Citing cases.)
>
> "In view of what we have said concerning the state of the record, the solution of the question must depend upon an examination and analysis of two subjects: the one, the reports of the Commission in the previous cases, and the other, the testimony which was before it and the report made in this case. * * *"

An examination of the recitals in the second report of the Commission of the additional facts developed on the further hearing show, that the distinctions sought to be made by the Commission in the two records, are distinctions without real differences or significance. The additional facts do not warrant the conclusion reached by the Commission. The functional and physical characteristics of a railroad like the North Shore do not change with the ebb and flow of the tides—they are more or less constant. A proper regard for the rights of the North Shore and of its employees demands stability in determinations of this kind. In the *Utah Idaho Central* case, this court said that a determination by the Commission, responsive to the requirements of the statute, is binding on both the Mediation Board and the carrier. The first determination of the Commission is of that character. While the doctrine of *res adjudicata* may not control decisions of the Commission, this court has said that the Commission is bound to recognize the validity of the rule of con-

duct prescribed by that ~~document~~ DOCTRINE. *Arizona Grocery Co.* v. *A. T. & S. F. R. Co.*, 284 U. S. 370, at 389. If the Commission may completely ignore that doctrine, and may, on its own motion, as was done here, make two different determinations of the same railroad on substantially the same facts, in the course of approximately two years, there is no reason why the Commission may not make an unlimited number of varying determinations at any time it chooses to do so.

During the past ten years, this court has decided four cases which involve the meaning of the phrase "interurban electric railway" not operated as a part of the general steam railroad system of transportation, as used in the Interstate Commerce Act, and in the Railway Labor Act. These cases are: *Piedmont & Northern* v. *I. C. C.*, 286 U. S. 299; *U. S.* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1; *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177; and *Texas Electric Railway Co.* v. *Eastus*, 25 F. Supp. 825, aff. *per curiam* 308 U. S. 512. In addition, the Circuit Court of Appeals, Seventh Circuit, has decided *Chicago South Shore & South Bend Ry. Co.* v. *Fleming*, 109 F. (2d) 419 and the Circuit Court of Appeals, Second Circuit, has decided *Hudson & Manhattan* v. *Hardie*, 103 F. (2d) 327, certiorari denied 307 U. S. 640.

The *Piedmont & Northern* case arose on a suit by the Interstate Commerce Commission to enjoin that railroad from constructing a line of railroad without a certificate as is required by railroads subject to section 1 (18-22) of the Interstate Commerce Act. Paragraph 22 of that section provides that the authority of the Commission shall not extend to "street, suburban or interurban electric railways, which are not operated as a part of a general steam railroad system of transportation." In that case the court held that the Piedmont & Northern, whose major activity was the transportation of interstate freight, was not an interurban electric railway. It said, among other things, at page 307:

> "It is clear that the phrase 'interurban electric railway' was not, in 1920, commonly used to designate a carrier whose *major activity* was the transportation of interstate freight in trains of standard freight cars."

The *North Shore* case arose on a suit by the government to enjoin the North Shore from issuing securities under section 20 (a) of the Interstate Commerce Act without the approval of the Interstate Commerce Commission. That section excludes from the definition of the term carrier "a street, suburban or interurban electric railway which is not operated as a part of a general steam railroad system of transportation." In that case the court held that the North Shore is an interurban electric railway, and not otherwise subject to Section 20 (a). It found no difficulty in distinguishing the North Shore from the Piedmont & Northern. After reciting that the North Shore handled freight with electric locomotives, interchanged carload freight with steam railroads, participated in more than 1,000 joint freight rates with steam railroads, and that only 22 per cent of the total revenue from the North Shore was derived from freight traffic, the court said:

> "We thus have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier. The facts differentiate the present case from *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299. There the railway was predominantly a carrier of interchange carload freight, and the proposed extension of line, which was the subject of that litigation, had as its object the creation of a link in a trunk-line route composed of the electric line and a number of steam railroads, which would divert from other steam railroad trunk-line routes some $4,000,000 of revenue annually. The purely local traffic in freight, passengers, baggage, and express was there relatively inconsequential; but here greatly preponderates. * * *"

It will be observed that in distinguishing the North Shore from the Piedmont & Northern the court stressed the fact that the latter was predominantly a carrier of interchange carload freight, whereas the North Shore was predominantly a carrier of passengers. It is still such a carrier.

The *Utah Idaho Central* case was the first case decided by this court under the Railway Labor Act. In the opinion in that case the court said, as to the term "interurban" at pages 180 and 181:

> "Congress did not define the term 'interurban.' Despite the desirability of such a definition and the difficulties occasioned by its absence, the term is not so destitute of meaning that it can be denied effect as a valid description. Respondent's standing upon exception necessarily treats it as valid and hence as susceptible of application. The view presupposes that the term 'interurban' denotes distinguishing factual characteristics which on appropriate inquiry may be ascertained. We have so treated the term in other relations." *Piedmont & Northern R.* v. *I. C. C.* 286 U. S. 299; *U. S.* v. *Chicago North Shore & Milwaukee,* 288 U. S. 1.

The court also held that a determination by the Commission under the Railway Labor Act is binding on both the carrier and the other interested parties, if made after hearing, is supported by substantial evidence, is not arbitrary or capricious and does not violate applicable rules of law. The court made it clear that the Commission's determination would not be binding if arbitrary or capricious, or contrary to applicable rules of law.

In the *Utah Idaho Central* case the government conceded that the railroad had certain characteristics of an interurban railroad. In dealing with these matters the court said at page 186:

> "The passenger business, however, yields but a minor part (about 18.1 per cent) of the total revenues. During the five years from 1930 to 1934, inclusive, the freight revenues amounted to $2,021,724.57 and the revenues from passengers, mail and express were

> $448,941.62. *The railway is predominantly a carrier of freight.*" (Italics ours.)

Here, as in the *North Shore* and in the *Piedmont & Northern* cases, the court recognized that an electric line which is predominantly a carrier of freight is not within the category of an interurban electric railway. After emphasizing the fact that the Utah Idaho Central was predominantly a carrier of freight and that its passenger business was relatively small, the court in sustaining the Commission said at page 187:

> "* * * the Commission performed its duty in weighing the evidence and in reaching its conclusion in the light of the dominant characteristics of respondent's operations which were fairly comparable to those of standard steam railroads."

This court sustained the decree of the three-judge court in the *Texas Electric* case by a *per curiam* order. The defendants rely upon the *Texas Electric* decision to support their contention that the fact that the passenger traffic predominates on the North Shore is not controlling. There is nothing in the decision in that case to warrant that view. Such a view completely ignores and disregards the emphasis given by this court to the predominance of passenger or freight traffic as the case may be, in the *Utah Idaho Central*, the *North Shore* and the *Piedmont & Northern* cases. Defendant's contention is but another way of saying that no standard has been set up by the Railway Labor Act as a guide to the Commission and that it has a roving authority to act in each case according to its whim or caprice. However, the facts with respect to the Texas Electric and the North Shore are not the same. In the *Texas Electric* case the government was represented by the same counsel as represents the defendants here. At page 18 of their brief in this court they stated that the Texas Electric derived 37 per cent of its total revenue from freight traffic, 58 per cent from freight, express and mail traffic, and 41 per cent from passenger traffic, excluding local street car traffic.

In the same brief counsel also emphasized that the Texas Electric "* * * can no longer be regarded as predominantly a passenger line * * *".

But the defendants say that in any event *Hudson & Manhattan R. Co.* v. *Hardie,* 103 F. (2d) 327, cert. denied 307 U. S. 640, supports their contention that the predominance of passenger traffic is immaterial. All of the traffic of the Hudson & Manhattan was passenger traffic. That case arose under the Railway Labor Act. The District Court had held that the Commission's determination was invalid. 22 Fed. Supp. 105. The Circuit Court of Appeals reversed that decision and sustained the Commission upon the ground, as stated by the Court at page 328 of its opinion:

> "The determination by the Interstate Commerce Commission that the Railway Labor Act did apply to the plaintiff was put on the ground that although it *was an interurban electric railway,* it was operating as a part of a general railroad system of transportation." (Italics ours.)

The report of the Commission in the *Hudson & Manhattan case,* 216 I. C. C. 745, at 746, 752, 753, shows that the Hudson & Manhattan had certain operating contracts with the Pennsylvania Railroad which referred to the former as a tunnel railroad, and that the Hudson terminal was regarded as a downtown terminal for the Pennsylvania and the Lehigh Valley railroads. The Commission emphasized the fact that the Hudson & Manhattan was under federal control during the entire period of such control and that no changes had occurred to give the carrier a different status since it was under federal control. These facts support the view that although the Hudson & Manhattan was held to be an *interurban electric railway because of its predominance as a passenger carrier,* it was nevertheless held subject to the Railway Labor Act since it was operated as a part of the Pennsylvania Railroad system of transportation. It will thus be seen that the *Hudson & Manhattan* case supports our contention and not the contention of the defendants.

Defendants may also contend that the decision of the court below in the *Chicago South Shore & South Bend* case, 109 Fed. (2d) 419, requires an affirmance of the judgment of that court in the case at bar. In that case, Judge Sparks recited that the elements which must be considered by the Commission in reaching its determination are set forth in the *Utah Idaho Central* case. He then referred to the fact that the South Shore had been reorganized under section 77 (m) of the Bankruptcy Act, which defined the term "railroad corporation" as not including a street, suburban or electric interurban railway which is not operated as a part of a general railroad system of transportation "or which does not derive more than 50 per cent of its operating revenue from the transportation of freight in standard steam railroad freight equipment." The South Shore derived more than 50 per cent of its operating revenue in that manner. Judge Sparks then concluded at page 420:

> "Having brought itself within the definition of railroad for that purpose, we think it cannot now deny similar classification for the purposes of the Railway Labor Act. This, we think, constitutes substantial evidence in support of the Board's determination and we are not permitted to disturb it."

Sections 1 (4) and 3 (4), of the Interstate Commerce Act, impose upon common carriers by railroad, irrespective of whether they are interurban electric railroads, the duty to establish reasonable through routes and through rates, and reasonable and equitable facilities for the operation of such through rotues, and for the interchange of equipment. The petitioner does not forfeit its character as an interurban electric railway merely because it has complied with the duties imposed upon carriers of its class by having established through routes and interchange arrangements with steam railroads *U. S.* v. *Munson S. S. Line*, 288 U. S. 43. Nor can it be assumed that Congress did a vain and futile thing in using the term "street, interurban or suburban electric railway" in the Railway Labor Act and in certain

provisions of the Interstate Commerce Act. If the decision of the Commission is sustained the effect will be practically to nullify these exceptions as applied to petitioner, and to nullify the effect of the decision of this court in *U. S.* v. *Chicago North Shore and Milwaukee R. Co.*, 288 U. S. 1, in which the court squarely held that petitioner is a "typical example of an interurban electric railway," as Congress used the term.

The court below did not even discuss the significance of the decision of this court in the North Shore case or in the other cases cited. It merely held that the Commission was not bound by the decision of this court in the North Shore case. If the Commission, in a case of this character, is not bound by decisions of this court, which declare the statutory demarcation between electric lines which are interurban electric railways and electric lines which are not, it follows that the Commission is not bound by any rule but is free to reach any conclusion on this question that may suit its whim or caprice at a given time.

Counsel for defendant attempt to overcome the effect of the decision of this court in the North Shore case upon the ground that the court was influenced by equitable considerations growing out of the fact that petitioner had issued securities during a period of over ten years without the approval of the Commission but with its knowledge and tacit acquiescence, and that in its opinion the court recognized that the case was not free from difficulty. It is true that, in the North Shore case the court did point out that the decision on the question was not free from difficulty, but the opinion nevertheless states that even if the status of the North Shore were a matter of first impression it would have held that Section 20a was inapplicable to that carrier.

Every important characteristic of the North Shore which was shown in the record before this court in the North Shore case has remained unchanged. None of the facts before the Commission in either of the proceedings to which reference has been made show any material or consequen-

tial change in the dominant physical or functional characteristics of the North Shore. Therefore, consistency and justice requires that this court reach the same conclusion in the instant case it reached in its decision of January, 1933.

Moreover, the same equitable considerations which influenced the court in its previous decision are present here. As stated in the securities case, this court held that the North Shore is an interurban electric railway, excluded from the provisions of Section 20(a) of the Interstate Commerce Act. If the court should now hold that the North Shore is not an interurban electric railway the effect of such a decision would be to make void the securities that have been issued by that carrier, without the approval of the Interstate Commerce Commission and, under such a decision, it would be required to pay taxes under the Carriers' Taxing Act instead of under the Social Security Act and it would also be subject to the provisions of the Railroad Unemployment Insurance Act. In the light of the previous decision of this court, of the conflict in the two decisions of the Commission, of the conflict between the decision of the court below, and the decision of the Circuit Court of Appeals in the Hudson and Manhattan case, confusion as to labor relations and as to other matters will result, unless this court grants certiorari and decides the issues involved.

The Determination by the Commission in Its Second Report That Petitioner is Operated as a Part of the General Steam Railroad System of Transportation is Contrary to the Statutes and is Arbitrary and Capricious.

As we have shown, in its second determination, the Commission found that the North Shore is not a street, interurban or suburban electric railway, as that phrase is used in the Railway Labor Act. It also decided that the North Shore is operated as a part of "the general steam railroad system of transportation." The part of the provision of Section 1. First., of the Railway Labor Act, pertinent to that finding, and to this discussion, reads as follows:

"Provided, however, that the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operated as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power."

It will simplify an understanding of the question if the clauses in the proviso are broken down. The proviso exempts a street, interurban or suburban electric railway:

(a) unless such railway is operated as a part of a general steam railroad system of transportation,

(b) but shall not exclude any part of the general steam railroad system of transportation, now or hereafter operated by any other motive power.

The words "such railway" in the first clause clearly refers back to a street, interurban or suburban electric railway. Such railways are exempt from the act unless they are operated as a part of a general steam railroad system of transportation. The second clause does not refer to street, suburban or interurban electric railways, as such, but refers to parts of the general steam railroad system, such, for example, as the Pennsylvania Railroad, the New York Central Railroad, and other steam railroad systems which operate parts of their lines by motive power other than steam, and which parts have never been described by the term "interurban." The second clause was put in the amendment to the Railway Labor Act of June 1934 to make certain that no part of a general steam railroad system of transportation would be excluded from the act, merely because at the time the amendment was made or in the course of events, such parts should be operated by power other than steam.

The Commission has decided, in a number of cases, that the word "system" as used in phrases of this character, was designed to embrace an operating relationship and

unity, involving (1) common control, (2) common management, and (3) operation as a system. *St. Louis & O'Fallon* case, 124 I. C. C. 3; *Michigan United Railway* case, 67 I. C. C. 452; *Sacramento Northern Ry. case*, 71 I. C. C. 653; *New York, Westchester & Boston Ry.*, 218 I. C. C. 253; and *Chicago South Shore & South Bend* case, 214 I. C. C. 167. The last two cases were decided after the amendment to the Railway Labor Act of June 1934.

Piedmont & Northern v. *United States*, 30 F. (2d) 421, a decision by a three-judge court, contains a comprehensive and pertinent discussion of the meaning of these phrases. In that case the court agreed with the Commission's interpretation of the word "system" and said that the word "general" as used in the phrase obviously refers to the *kind* of transportation performed, that is, whether the service performed by the railway was *special, local* or *general*. Congress used the word "general" in the same sense in Section 204 and Section 209 of the Transportation Act of 1920 and in Section 15(a) as enacted that year. The Circuit Court of Appeals, Second Circuit, used the phrase in the same sense in *Hudson & Manhatton R. Co.* v. *Hardie*, 103 F. (2d) 327, certiorari denied 307 U. S. 640.

In its second determination, however, the Commission gave the second clause in the proviso a meaning which is contrary to numerous previous decisions and one not warranted by either the language or the spirit of the statute. The Commission concedes that the phrase in the first clause "unless such railway is operated as a part of a general steam railroad system of transportation" means a particular railroad system of transportation. But it construes the second clause in the proviso, which is the same as the first, except in the second clause the word "general" is preby ceded "the" instead of by "a", as embracing a national transportation system, that is, a composite system made up of all of the steam railroads of the country. Upon that hypothesis it assumed that if any electric line had interchange or through freight rate arrangements with steam railroads,

the electric line, on that account, became a part of the national steam railroad system of the country.

It would be difficult to conceive of a more strained and distorted construction of the law when the language and the purpose of the proviso is kept in mind. There is no such thing in America as a national system of transportation as the Commission used the term. Such railroad system or systems as exist are composed of separately incorporated and separately operated railroads. If Congress had meant to create a national system of transportation for the purposes of the administration of the Railway Labor Act, or had meant to bring interurban electric railways within the reach of that act, merely because they maintain interchange and through rate arrangements with steam railroads, it certainly could have found language more adapted to express that thought.

By Section 5(4) of the Interstate Commerce Act, repealed September 18, 1940, the Commission was required to "adopt a plan for the consolidation of railway properties of the continental United States into a *limited number* of *systems*," and it adopted such a plan. *Consolidation of Railroads*, 159 I. C. C. 522. Although Section 5(4) embraced all common carriers by railroad, subject to the act, and did not exclude interurban electric railways, the Commission did not think the North Shore important enough even to consider it as a part of its plan of railroad consolidation. If there is existed a "general steam railroad system of transportation," in the sense the Commission used that phrase, there would have been no reason for Congress to have required the Commission to adopt a plan of consolidating the railway properties into a *limited number* of *systems*.

The Commission misinterpreted and misapplied the statute and, to the extent that the court below sustained that interpretation, it erred.

CONCLUSION.

In January 1933, this court held that the petitioner is an interurban electric railway. In November 1936, the Interstate Commerce Commission made a similar determination. In July 1939, the Commission purported to reverse its previous determination. The court below sustained the Commission, the effect of which is to hold that petitioner is not an interurban electric railway. These various decisions have created confusion and uncertainty as to the status of the petitioner, under the various Federal statutes, and as to its rights and the rights of its employees under certain of these statutes. The fact that competing labor organizations are parties to this proceeding is enough, without more, to show that confusion already exists in the labor relations of the petitioner. Certainty, in respect to these matters, can only be established by a decision of this court. For these and the other reasons stated, it is respectfully requested that the court grant the writ of certiorari petitioned for herein.

Respectfully submitted,

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